

THE HONORABLE MARSHA J. PECHMAN
Noted on Motion Calendar
August 10, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRAVIS MICKELSON, DANIELLE H.
MICKELSON, and the marital community
thereof,

Plaintiffs,

v.

CHASE HOME FINANCE LLC, an unknown
entity, et al.,

Defendants.

No. 2:11-cv-01445 MJP

CHICAGO TITLE INSURANCE
COMPANY'S MOTION TO STRIKE AND
REPLY IN SUPPORT OF ITS MOTION TO
DISMISS CPA CLAIM

**NOTE ON MOTION CALENDAR:
Friday, August 10, 2012**

I. MOTION TO STRIKE

Defendant Chicago moves the Court pursuant to Local Rule 7(g) for an Order striking information contained in Plaintiffs' Response (Dkt. No. 87 at p. 2, lines 10-19 and p. 3, lines 16- 22) concerning unrelated instruments recorded in Snohomish County.

The new and unrelated information does not appear in Plaintiffs' Complaint. To supply the Court with new information at this stage in the case, Plaintiffs are first required to obtain the Court's leave to amend their Complaint. FRCP 15(a)(2). Having failed to first

CHICAGO'S MOTION TO STRIKE
AND REPLY IN SUPPORT OF ITS
MOTION TO DISMISS CPA CLAIM – 1
CASE NO. 2:11-CV-01445

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1 amend their Complaint, this new information should be stricken from the Court's record. Only
 2 facts alleged in Plaintiffs' Complaint are relevant to Chicago's pending motion to dismiss
 3 Plaintiffs' CPA claim. FRCP 12(b)(6).

4 **II. REPLY IN SUPPORT OF CHICAGO'S MOTION TO DISMISS CPA CLAIM**

5 Plaintiffs' Complaint does not include a single allegation against Chicago that could
 6 support a CPA claim. This claim must be dismissed as to Chicago.

7 The WCPA prohibits "[u]nfair methods of competition and unfair or deceptive acts in
 8 the conduct of any trade or commerce." RCW 19.86.020. In order to prove a claim under the
 9 statute, a private plaintiff must plead that: (1) the defendant engaged in an unfair or deceptive
 10 act or practice; (2) occurring in trade or commerce; (3) impacting the public interest; (4)
 11 which caused injury to the plaintiff's business or property; and (5) the injury is causally
 12 related to the unfair or deceptive act. *Panaq v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37,
 13 204 P.3d 885 (2009); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105
 14 Wn.2d 778, 784-85, 719 P.2d 531 (1986). Failure to meet any one of these elements is fatal
 15 to the claim and requires its dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38
 16 P.3d 1024 (2002).

17 Plaintiffs have presented no evidence of an "unfair or deceptive act or practice" by
 18 Chicago. A plaintiff must allege an unfair or deceptive act or practice that actually deceived
 19 or had "the capacity to deceive a substantial portion of the public." *Hangman Ridge*, 105
 20 Wn.2d at 785. Plaintiffs assert in their Response that facts in support of a CPA claim are plead
 21 under Paragraphs 11.20, 11.21 through 11.21.3 of their Amended Complaint (See Response at
 22 p. 2 lines 1-7). However, Paragraphs 11.1 through 11.23 are all allegations asserted in support
 23 of a claim for criminal profiteering – a claim already dismissed by this Court. (Dkt. No. 58).

1 Only Paragraph 13.7 of Plaintiffs' Amended Complaint mentions Chicago in the
 2 context of a violation of the Consumer Protection Act and loosely claims "unfair or deceptive
 3 act or practice":

4 13.7. Defendants Chicago Title and Freddie Mac engaged unfair and deceptive
 5 practices in trade or business, which injured the plaintiffs, by contractually
 6 defining, enforcing, or drafting uniform language which defines MERS as a
 7 beneficiary under the Washington Deed of Trust Act in order to facilitate mass
 8 foreclosures, when by statute the beneficiary of a Deed of Trust is statutorily
 9 defined to be the person who holds the note.

10 (Dkt. No. 29 at p. 64).

11 Regardless, all of the facts establish that Chicago acted in accordance with
 12 Washington's Deed of Trust Act. Plaintiffs fail to explain how appointment as trustee to a
 13 deed of trust, as authorized by our Deed of Trust Act, is simultaneously a violation of the
 14 Consumer Protection Act. Plaintiffs cite no authority for their position.

15 Furthermore, in a private transaction like the mortgage loan that is the subject of
 16 Plaintiffs' Amended Complaint, the vague assertion that Chicago somehow facilitated mass
 17 foreclosures because of its statutory role as a trustee is not sufficient to sustain this claim.
 18 Furthermore, ordinarily, a breach of a private contract affecting no one but the parties to the
 19 contract is not an act or practice affecting the public interest." *Hangman Ridge*, 105 Wn.2d at
 20 790. (citations omitted).

21 Plaintiffs also fail to present facts establishing the fifth element, causation. In *Indoor*
 22 *Billboard v. Integra Telecom*, the Washington Supreme Court held that a plaintiff must
 23 establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have
 suffered an injury. 162 Wn.2d 59, 63 (2007). Plaintiffs' Complaint lacks any causation
 element. The injury Plaintiffs assert is that they lost their home to foreclosure and have had to

incur fees in challenging the foreclosure. The foreclosure occurred because Plaintiffs
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 AND REPLY IN SUPPORT OF ITS
 MOTION TO DISMISS CPA CLAIM – 3
 CASE NO. 2:11-CV-01445

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1 defaulted on their loan obligations and did not remedy this harm after receiving the notice of
2 default. Defendants' alleged statements did not prevent Plaintiffs from contesting the
3 foreclosure action. For each of these independent reasons, Plaintiffs' CPA claim should be
4 dismissed.

5 **III. CONCLUSION**

6 For these reasons, Chicago's Motion to Strike and Motion to Dismiss CPA Claim
7 should be granted and Plaintiffs' CPA claim against Chicago should be dismissed with
8 prejudice.

9 DATED this 10th day of August, 2012.

10 FIDELITY NATIONAL LAW GROUP

11 /s/ Erin M. Stines

12 Erin M. Stines, WSBA #31501

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17 *Title Insurance Company*

CERTIFICATE OF SERVICE

I certify that on the date given below, I electronically filed this document entitled **CHICAGO TITLE INSURANCE COMPANY'S MOTION TO STRIKE AND REPLY IN SUPPORT OF ITS MOTION TO DISMISS CPA CLAIM** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following persons:

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SIGNED this 10th day of August, 2012 at Seattle, Washington.

/s/ Erin M. Stines

Erin M. Stines

CHICAGO'S MOTION TO STRIKE
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CASE NO. 2:11-CV-01445

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